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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----X

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

08 CR 709 (DLC)

4
5 MARTIN SMELING NUNEZ, a/k/a
5 "Chicho",

6
6 Defendant.

7 -----X

8
8
9 February 6, 2009
9 2:30 p.m.

10
10
11 Before:

11
12 HON. DENISE L. COTE,

12
13 District Judge

13
14 APPEARANCES

15
15 LEV DASSIN

16 United States Attorney for the
16 Southern District of New York

17 BY: TODD BLANCHE

17 Assistant United States Attorney

18
18 JOHN J. GARZON

19 Attorney for Defendant
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1 (In open court)

2 (Case called)

3 THE DEPUTY CLERK: Is the government ready to
proceed?

4 MR. BLANCHE: Yes. Good afternoon, your Honor.
Todd

5 Blanche for the government.

6 THE DEPUTY CLERK: Defendant Nunez, are you ready
to
7 proceed?

8 MR. GARZON: Yes, your Honor. John Garzon here
for
9 Mr. Nunez.

10 THE COURT: Mr. Garzon, have you and your client
11 reviewed the presentence report?

12 MR. GARZON: Yes, we have, your Honor.

13 THE COURT: Have you discussed it with each
other?

14 MR. GARZON: We have, your Honor.

15 THE COURT: Any objections to it?

16 MR. GARZON: We have no objections to the report,
your
17 Honor.

18 THE COURT: Thank you. The presentence report
will be
19 made part of the record in this case and placed under

seal. If
20 an appeal is taken, counsel on appeal may have access to
the

21 sealed report without further application to this Court.

22 This is a case in which there is a guideline,
23 stipulation with an offense level 25 and a criminal
history

24 category I. There is also a mandatory minimum term of
25 imprisonment of 120 months that applies. Therefore, the

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1 guidelines stipulation assumes that the defendant will be
able
2 to qualify for the safety valve provision of the law. Let
me
3 make that inquiry now..
4 There's agreement that the defendant is in
criminal
5 history category I. Does the government have information
that
6 the defendant used violence or credible threats of
violence or
7 possessed a firearm or other dangerous weapon or induced
8 another person to do so in connection with the offense?
9 MR. BLANCHE: No, your Honor.
10 THE COURT: Did the offense result in death or
serious
11 bodily injury to any person?
12 MR. BLANCHE: No, your Honor.
13 THE COURT: Was the defendant an organizer,
leader,
14 manager or supervisor of others in the offense, or engaged
in a
15 continuing criminal enterprise?
16 MR. BLANCHE: No, your Honor.
17 THE COURT: Did the defendant truthfully provide
to
18 the government all information and evidence that it has
19 concerning the offense or offenses that were part of the
same
20 course of conduct or common scheme or plan with the
offense of
21 conviction?
22 MR. BLANCHE: Yes.
23 THE COURT: Thank you. I find that the defendant
does
24 qualify for the safety valve provision of the law.
25 The presentence report also concluded that
offense

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1 level 25 applied in criminal history category I. I've
reviewed
2 the report carefully, the parties' submissions, and I
adopt
3 that determination as my own.
4 I have a submission from the government, a
sentencing
5 memorandum dated January 30th. Did the government file
that
6 with the Clerk of the Court?
7 MR. BLANCHE: Yes, your Honor.
8 THE COURT: Thank you.
9 I received at midday today a submission from
10 Mr. Garzon with letters of reference and other documents
for
11 the defendant. Mr. Garzon, have you filed your submission
with
12 the Clerk of the Court?
13 MR. GARZON: No, your Honor. I did submit a copy
to
14 Mr. Blanche this afternoon as well, and just a copy that I
15 submitted to your clerk at midday today, your Honor. I
have
16 not filed an ECF yet or with the general clerk of the
Court,
17 your Honor.
18 THE COURT: Do you need another copy of the
procedures
19 for doing that?
20 MR. GARZON: Judge, I did have some problem
filing it
21 earlier this week with my ECF in the office.
22 THE COURT: We'll give you another copy of the
set of
23 procedures you're to follow.
24 MR. GARZON: Thank you, your Honor.
25 THE COURT: And I want you to make sure this is
filed

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1 by Monday.

2 MR. GARZON: Yes, I will, your Honor.

3 THE COURT: Thank you. I'll hear from the
government.

4 MR. BLANCHE: Your Honor, the government has
nothing

5 to add beyond its letter of last week, unless your Honor
has

6 any questions.

7 THE COURT: Thank you.

8 Mr. Garzon?

9 MR. GARZON: Thank you, your Honor.

10 Your Honor, I am asking the Court to consider a
11 sentence below the recommended guideline range, Judge. We

have
12 no objections to the information contained in the
presentence

13 investigation, Judge. However, I've reviewed the report
and

14 the addendum as well, and I understand, Judge, that the
15 probation department recommends a sentence of 57 months,

that
16 being the low guideline range, based on the offense level
of

17 25, your Honor. We concur with that offense level, your
Honor.

18 I would ask the Court, though, however, your
Honor, to

19 consider a sentence of a lesser range for Mr. Nunez,
Judge,

20 based on the personal circumstances related to the case
itself

21 and relating to Mr. Nunez's personal circumstances as
well,

22 Judge. If I could just point those out to the Court, your
23 Honor. It's indicated in the probation report, your

Honor,
24 with regard to the information surrounding Mr. Nunez's
25 involvement in this particular matter, more importantly,

Judge,

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1 that being Mr. Nunez is a criminal history category I.
2 Judge, as the report reflects, he has really
never had 3 any contact in this kind of conduct. He had one minor
4 situation, Judge, that resulted in dismissal for having
5 improper plates on his vehicle, Judge, but certainly never
any 6 kind of conduct relating to controlled substances, whether
that 7 be personal use or certainly not trafficking controlled
8 substances, Judge. The report reflects, Judge, Mr. Nunez
was 9 not a user of controlled substances, Judge.
10 But I would just suggest to the Court, Judge,
that 11 it's consistent with the information provided by the
agents 12 that conducted this investigation, your Honor, that he was
13 approached by someone that was a cooperating witness, your
14 Honor, and that he agreed knowingly and willfully, Judge,
to 15 participate in these two transactions that he is charged
with 16 here, your Honor.
17 I would just ask the Court to consider the fact
that 18 Mr. Nunez is not alleged to be, Judge, a person who is
19 previously known to be a drug trafficker or someone that
had 20 been -- has a record of engaging in this type of conduct,
21 Judge. In the government's memorandum, Judge, it does
state 22 that their position is not that this would have been a
23 transaction or an incident where it could be considered an
24 aberrant incident to Mr. Nunez. However, Judge, I would
25 suggest to the Court that based on the lack of any prior

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Nunez 1 criminal conduct, Judge, it seems consistent with Mr.
2 participating in this particular incident, Judge, at the
3 inducement perhaps of the cooperating witness; although he
4 admits and takes responsibility, Judge, for having agreed
to
5 having been the person to supply the cooperating witness
with
6 the heroin and subsequently, Judge, with the cocaine, with
the
7 crack cocaine that was the subject of the criminal
conduct,
8 your Honor.

9 THE COURT: I want to make sure I understand you,
10 Mr. Garzon. Are you saying that the only drug sales that
your
11 client ever participated in are the sales of 35 grams of
heroin
12 to -- in connection with that confidential informant, 70
grams
13 of heroin in connection with that same person and then the
14 purchase of the crack cocaine? Are you saying that's it?
15 MR. GARZON: Judge, I'm not representing to the

Court
16 that I would have any information as to whether those were
the
17 only transactions that Mr. Nunez was ever involved with.
What
18 I'm suggesting to the Court, your Honor, is that the lack
of
19 any prior criminal history seems to indicate that Mr.
Nunez,
20 this is the first time that he was ever involved in a
criminal
21 case. He has no prior history, Judge.

22 I would ask the Court to consider the fact that
the
23 probation report confirms, your Honor, that Mr. Nunez, as
far
24 as the investigation is concerned, has been a gainfully
25 employed person, your Honor. He's lived with his family.

He

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 1 supports three children, your Honor, right now that he
 recently
 2 has; yes, a three-month old child, two other minor
 children,
 3 your Honor. He is not under any obligation for child
 support.
 4 I would ask the Court to consider, Judge, these personal
 5 circumstances which seem to indicate that Mr. Nunez
 certainly
 6 is not a person that was engaged in any prior criminal
 history
 7 or conduct that we know of, your Honor.
 8 So I'm asking the Court to balance that, Judge,
 with
 9 your Honor's decision as to what would be a reasonable
 sentence
 10 pursuant to the 3553 factors, your Honor. I understand
 that
 11 the Court has to consider whatever it deems necessary in
 terms
 12 of the actual offense conduct, your Honor, the need to
 protect
 13 the community from any further criminal conduct of the
 14 defendant. And the reason that I'm pointing that out,
 your
 15 Honor, is I believe it's consistent to say that Mr. Nunez
 has
 16 not been a danger to the community, apart from this
 particular
 17 case that we're aware of, Judge, than the conduct he
 engaged in
 18 this particular case. This is the argument I'm asking the
 19 Court to consider, your Honor.
 20 Again, your Honor, more importantly, I'd like to
 21 emphasize to the Court his personal background, your
 Honor.
 22 That is, the closeness that he has with his family, Judge,
 the
 23 minor children that he is presently supporting. The fact,
 your
 24 Honor, that he has -- he is gainfully employed, it states
 here,
 25 Judge, that they verified his employment, Judge, because
 he's a

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1 member of the carpenter's union, Judge. So he does have,
2 Judge, certainly positive factors, your Honor, that the
Court
3 could take into consideration in fashioning the sentence,
4 Judge.
5 I'd ask the Court to consider, Judge, a sentence
below
6 the guideline range, for the factors which I just pointed
out
7 to the Court.
8 THE COURT: Thank you.
9 MR. GARZON: That would be all. Thank you, your
10 Honor.
11 THE COURT: Mr. Nunez, I'll hear anything that
you
12 have to say to me in connection with your sentence.
13 THE DEFENDANT: Yes, your Honor.
14 I would like to say I'm sorry for the government
of
15 the United States. I'm sorry for my family, and I have
three,
16 for the mistake I did. I would like to say for you to be
17 concerned on your best for my -- for my sentencing. So
that
18 would be all, your Honor. Thanks.
19 THE COURT: Mr. Nunez, I do not believe that
there is
20 any need to sentence you at any point higher than the low
end
21 of the guidelines range here. I've considered the
22 Section 3553(a) factors and find the sentence of 57
months'
23 imprisonment would be reasonable in the circumstances;
that it
24 would provide sufficient punishment to you for your drug
25 dealing. It would provide adequate general deterrence for

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1 others who might be tempted to pursue that kind of
activity,
2 and it would send a clear message to you and provide
sufficient
3 individual deterrence to convince you not to resume these
4 activities.
5 And I'm going to impose a term of supervised
release
6 of five years to follow the term of imprisonment with the
7 following special conditions: That you report to the
probation
8 office in the district to which you are released within 72
9 hours of release from custody; that you not commit another
10 federal, state or local crime; that you not illegally
possess a
11 controlled substance; that you submit to the regular drug
12 testing program; that you are prohibited from possessing a
13 firearm or other dangerous weapon; that you cooperate in
the
14 collection of DNA as directed by the probation officer;
that
15 you comply with the standard conditions of supervised
release;
16 that you submit to the regular program in terms of a
reasonable
17 search by the probation officer; that you be supervised by
the
18 district of your residence; and that you pay a special
19 assessment of \$100. I decline to impose a fine, finding
that
20 you would be unable to pay one, given your financial
21 circumstances.
22 Counsel, is there any legal reason not already
argued
23 to me why I cannot impose the sentence I've described as
24 stated?

25 MR. BLANCHE: No, your Honor.

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1 MR. GARZON: No, your Honor.

2 THE COURT: I order the sentence I have described

on

3 the record to be imposed as stated.

4 I believe there's an underlying indictment.

5 MR. BLANCHE: Your Honor, the government moves to
6 dismiss any open counts against the defendant now.

7 THE COURT: That application is granted.

8 Mr. Nunez, I need to advise you of your right to
9 appeal. I know of no ground for an appeal. You entered a

plea

10 of guilty here. You signed a guideline stipulation

waiving

11 your right to appeal in certain respects, but nonetheless,

I'm

12 required to advise you of the following: If you are

unable to

13 pay the cost of an appeal, you may apply for leave to

appeal

14 informa pauperis. Any notice of appeal must be filed

within

15 ten days of the judgment of conviction.

16 You may be seated.

17 Mr. Garzon, did you have an application?

18 MR. GARZON: Judge, I would ask the Court to

permit

19 Mr. Nunez to remain at liberty as recommended by the

probation

20 report, Judge. He is a good candidate for surrender,

Judge,

21 and I would ask the Court to schedule a date for his

surrender,

22 Judge.

23 THE COURT: I'm going to permit the defendant to

24 surrender by March 20th at 2:00 p.m. with the marshals in

this

25 courthouse, if he has not already received notice as to

his

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to
the

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1 designated facility and date of self surrender. A failure
2 surrender as required to serve this sentence could subject
3 defendant to additional criminal penalties.
4 Do you understand that, Mr. Nunez?
5 THE DEFENDANT: Yes, your Honor.
6 THE COURT: Counsel?
7 MR. GARZON: Thank you, your Honor.
8 MR. BLANCHE: Thank you, your Honor.
9 THE COURT: Thank you.
10 (Adjourned)

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